LIBRARY
OCT 13 1961
JAMES R. BROWNING, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 494

FREIDA MANDEL and SAM MANDEL,
Petitioners,

—against—

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONRAD B. DUBERSTEIN,
26 Court Street,
Brooklyn 1, New York,
Attorney for Petitioners.

HARRIS BIRNBAUM,
On the Brief.

THE ALBERT PRESS, INC. — TRIANGLE 5-1058 - 1059

INDEX

Subject Matter

	PAGE
The Opinion Below	1
Statement of Grounds of Jurisdiction	2
Questions Presented for Review	2
Statement of the Case	2
Reasons for Granting the Writ	5
Conclusion	9
Appendix A	10
Appendix B	11

Cases Cited

Gibson v. Thompson (1957), 355 U. S. 18, Rehearing denied, 355 U. S. 900, 78 S. Ct. 258 (1957) 6

Korte v. New York, N.H. and H. RR. (1951), 2d Cir., 191 F. 2d 86, 88, Certiorari denied: New York, N.H. and H. RR. v. Korte (1951), 342 U. S. 868 ..... 5, 7

Lavender v. Kurn (1946), 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 6

Myers v. Reading Co. (1947), 331 U. S. 447, 485, 486, 67 S. C. 1334, 1339, 91 L. Ed. 1615 ..... 6, 7

PAGE

Rogers v. Missouri Pac. R.R. (1957), 352 U. S. 500, 510 6

Schilling v. Delaware & H.R. Corp'n (1940), 2d Cir., 114 F. 2d 69, 71 5

Wilmington Star Mining Co. v. Fulton (1907), 205 U. S. 60 8

Statutes Cited

28 U. S. C., Section 1254 2

References Cited

McCormick on Evidence, Chapter 25, Section 228 at p. 464 7

Uniform Rules of Evidence, Draft of August 28, 1953, Section VIII, Rule 63, and Comments 8

Wigmore on Evidence, Vol. 6, Section 1789 8

Wigmore on Evidence, Vol. 6, Section 1790 8

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

FREIDA MANDEL and SAM MANDEL,

Petitioners,

—against—

THE PENNSYLVANIA RAILROAD COMPANY,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which reversed and remanded to the United States District Court for the Eastern District of New York.

The Opinion Below

The opinions of the United States Court of Appeals, Second Circuit, has not yet been officially reported. A copy of both opinions is hereto annexed as Appendix A and B (pp. 10-12, *infra*).

Statements Of Grounds Of Jurisdiction

1. The Judgment of the United States Court of Appeals, Second Circuit, was rendered on May 23, 1961. A second opinion reversing and remanding after rehearing was rendered on July 17, 1961.

2. Timely application for reargument was made, which was denied August 3, 1961.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C., Section 1254.

Questions Presented For Review

1. In the face of probative facts to lead to a proper finding in favor of petitioners, did the Court of Appeals abuse its discretion in remanding and reversing the jury's findings?

2. Did the Court of Appeals abuse its judicial function by substituting its view of the facts for that of the jury by far departing from the accepted and usual course of judicial proceedings?

Statement Of The Case

Petitioners were passengers on one of defendant's railroad trains, enroute from New York City to Hot Springs, Arkansas, when the accident occurred on December 4, 1957.

About 1:00 A.M. Freida Mandel, while walking to the ladies lavatory in the rear of the car, fell and was injured.

Alleging that a fall was the cause of a wet and slippery condition on the car's floor, the inadequate lighting, the manner in which the train was operated, and its speed, Mr. & Mrs. Mandel commenced this action in the Supreme Court of the State of New York, Kings County. It was removed to Federal District Court for the Eastern District by reason of diversity of citizenship.

The jury returned a verdict of $20,000.00 for Freida Mandel and $2,000.00 for Sam Mandel, upon which judgment was entered.

Defendant-respondent appealed to the Circuit Court, Second Circuit alleging as reversible error, among other things, the trial judge's charge that unless there was evidence of "extraordinary swaying or jerking or jolting" the operation of the train was prudent, but that this did not prevent a finding of negligence based on the floor and lighting condition (pp. 38a, certified record; see also opinion of May 23, 1961; App. "A", *infra*).

The Court ruled by its Per Curiam decision of May 23, 1961, that it must be presumed that the jury's verdict was based on negligence properly found and not, contrary to the charge, upon "extraordinary swaying" of which there was "no evidence" (App. "A", *infra*).

On July 17, 1961, the Circuit Court after granting a petition for rehearing and without further reargument, reversed itself and remanded the case, believing that the issue of "extraordinary swaying" upon which there was "no evidence" was not effectually removed from the jury's consideration (App. "B", *infra*).

The Court did overlook substantial testimony dealing with the movement of the train which testimony was before the jury below. It was testified to by the conductor of the train that the schedule speed at Port Royal, where the accident happened, was 75 miles per hour (p. 19a, certified record):

Westbrook—Direct:

> "Q. * * * How does the speed change? A. The speed is 75 miles per hour at Port Royal and then we reduce to 60 miles per hour and then to 40 and then we increase to 55.
>
> Q. Would you describe this part of the track that you reduce this speed to 40 miles per hour? A. What do you mean?

Q. Well, was it straight or curved? A. We reduced the speed on the curved track.

Q. How do you describe that curve? A. The first curve when we got to it, it is to the left and the next two curves, one is to the right and two more to the left."

It was also testified to that the train was one hour behind schedule and that in the trip between Altoona and Harrisburg it made up eleven minutes. Therefore, there was an average increase in speed of the train above and beyond the schedule speed of approximately five miles per hour (p. 82a, certified record; reference to minutes, pp. 531, 532, 353-356):

Dalby—Cross (531):

"Q. What time did you get to Altoona? A. I believe around 2:50."

* * * * *

"Q. What was the schedule this train was on, according to the schedule? * * * A. I think that train was due in there at 1:50. We were running about an hour late."

Westbrook—Direct (353):

* * * * *

"Q. How long does it take to run the train from Harrisburg to Altoona? * * * A. Two hours twenty-five minutes."

* * * * *

"The Court: This is the time that it normally takes for this train to get from Harrisburg and to Altoona your answer is two hours twenty-five minutes?

The Witness: Yes.

Q. How long did it take this train to run from Harrisburg to Altoona?

* * * * *

The Court: I asked what was the shortest time. I want to know if he made up a train on the route.

Q. How much time did you take to make it up? A. Two hours—about two hours and fourteen or fifteen minutes."

This means that at some points in its run, particularly at Port Royal near the place where the accident happened, the train was travelling at approximately eighty miles per hour, in an area where the tracks curve. Petitioners respectfully submit that the foregoing is sufficient to create an issue as to extraordinary movement to be submitted to the triers of the facts. To hold that there was "no evidence whatsoever" of this movement seems to indicate that this evidence was overlooked in considering defendant-appellant's petition for rehearing at the Circuit Court level.

Reasons For Granting Writ

This case raises serious and important questions:

1. Today with the myriad cases coming to verdict "* * * Unless there is complete absence of probative facts to support the conclusion reached, the jury's verdict must stand * * *" (*Korte* v. *New York, N.H. and H. RR.*, [1951, 2d Cir.], 191 F. 2d 86, 88, Certiorari denied; *New York, N.H. and H. RR.* v. *Korte* [1951], 342 U. S. 868; *Schilling* v. *Delaware & H.R. Corp'n* [1940, 2d Cir.], 114 F. 2d 69, 71).

To that same effect, and again in an appropriate case, the Supreme Court reiterated its position by merely stating that "* * * Special and important reasons for the grant of certiorari in these cases are certainly present when lower

Federal and State Courts persistently deprive litigants of their right to a jury determination" (*Rogers* v. *Missouri Pac. R.R.* [1957], 352 U. S. 500, at pp. 510).

To the same effect is *Gibson* v. *Thompson* [1957], 355 U. S. 18, Rehearing Denied, 355 U. S. 900, 78 S. Ct. 258 (1957).

In anticipation of respondent's argument, it is petitioners' position that although *Rogers* v. *Missouri Pac. R.R.*, *supra*, dealt with a case arising under *FELA*, the principle of law that petitioners respectfully put forth here is of equal force and strength in a non-*FELA* case, as in a *FELA* case. The sustained efforts of the Supreme Court to preserve the integrity of the jury system denies respondent's contention that by a mere classification of a case thus will determine whether or not a jury verdict can be set aside.

Words ought to be made subservient to the intent, not the intent to the words. *Verba intentioni, non e contra, debent inservire.*

2. If the verdict of a jury which the Court of Appeals first found was based upon substantial evidence, and is in no way contrary to the weight of the evidence can be set aside for the reasons given in the second opinion, no verdict is safe.

"Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. Where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable" (*Lavender* v. *Kurn* [1946], 327 U. S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916, which is quoted again in *Myers* v. *Reading Co.* [1947], 331

U. S. 447, 485, 486, 67 S. Ct. 1334, 1339, 91 L. Ed. 1615, approved and adopted *in toto* by this Court in *Korte* v. *New York, N.H. and H. RR., supra,* at p. 88).

3. The Court of Appeals went further in its opinion to limit the cross-examination of defendant's conductor and trainman on the remand for a second trial with regard to complaints made to them by a third person who never testified. The questions as to complaints made by third persons were proper on the issue of notice and the Court erred in stating that they cannot be justified as proper cross-examination.

Bearing in mind that the witnesses were the conductor and the trainman who were the defendant's representatives in charge of the passengers and the train, whether or not actual notice was had by either of them of the condition of the lights or of the floor of the car was a very relevant issue. This knowledge or notice, if not based on personal observation would of necessity be based upon complaints of the condition made by third persons. The per curiam opinion on the petition for rehearing refers to Exhibit Q for Identification and states that the statement fails to show that he did indeed complain to the witness.

The exhibit refers to light failure and to making a statement regarding the condition of the lights. It would, therefore, seem that the foregoing would justify the use of the word complaint in the course of the cross-examination of the witness train conductor who denied this part of the conversation in his previous testimony.

It seems to be hornbook law that this testimony is admissible and not objectionable under the Hearsay rule.

McCormick on Evidence, Chapter 25, Section 228, at page 464 states: "When it proved that D made a statement to X, with the purpose of showing, circumstantially, the probable state of mind of X, such as notice, knowledge or motive, or to show the information X had as bearing on

the reasonableness or good faith of the subsequent conduct of X, the evidence is not subject to attack as Hearsay."

Wigmore on Evidence at Volume 6, Section 1789 states. "Wherever an utterance is offered to evidence the state of mind which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned." See also, 6 Wigmore, Evidence, Section 1790 (3d ed. 1940). See also, Uniform Rules of Evidence, Draft of August 28, 1953, Section VIII, Rule 63, and Comments.

The direction by the Court of Appeals, Second Circuit, in its decision of July 17, 1961, with regard to testimony admissible on the trial would therefore unduly and unwarrantly hamper the proof if there were to be another trial.

4. Petitioners submit that the Court of Appeals in this case was too prone to reverse and remand without giving due consideration to the entire record of the trial. The context in which *Wilmington Star-Mining Co.* v. *Fulton*, the decision of this Court at 205 U. S. 60, was used as the principal authority for the reversal and remand indicates a need for a restatement by this Court of the limited application of that case to a situation where the record is completely barren and wholly devoid of a theory which the jury is charged it may use to support its verdict. Furthermore petitioners submit that the climate for verdicts of this kind in Appellate Courts in the general area is not salutory and that the Courts are altogether too prone to reverse and remand cases for a new trial and that it is time for this Court to make known and crystalize a solution to this increasingly recurring problem.

CONCLUSION

FOR THE FOREGOING REASONS A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT.

Respectfully submitted,

CONRAD B. DUBERSTEIN,
26 Court Street,
Brooklyn 1, New York,
Attorney for Petitioners.

HARRIS BIRNBAUM,
On the Brief.

APPENDIX A

(Opinion By Court Of Appeals Dated May 23, 1961 Affirming Judgment Of District Court)

PER CURIAM:

Mr. and Mrs. Mandel were passengers on one of defendant's trains, en route from New York City to Hot Springs, Arkansas, when the accident which gave rise to this action occurred. Near 1 a.m., Mrs. Mandel, while walking to the ladies' lavatory in the rear of the car, fell and was injured. Alleging that her fall was caused by the wet and slippery condition of the car's floor, the inadequacy of lighting, the manner in which the train was operated, and its speed, the Mandels commenced this action in the Supreme Court of the State of New York, Kings County. It was removed to federal court by reason of diversity of citizenship. The jury rendered a verdict of $20,000 for Mrs. Mandel and $2,000 for Mr. Mandel, upon which judgment was entered. Defendant appeals.

Defendant's principal claim of error relates to the charge. Actually, however, the judge charged the jury in accordance with the rules of law that defendant invokes. His charge, the relevant portions of which are set out in the margin,[1] was that unless there was evidence of "extraordinary swaying or jerking or jolting," none of which he himself remembered, the operation of the train was prudent, but that this would not prevent a finding of negligence based on the

---

[1] "Now, in determining every one of these facts, and the testimony generally, and in giving the weight, you should and must use your good common sense, your experience, and we know from experience that every train sways, and comes to a stop.

"The Court has no independent recollection of any testimony as to whether there was any extraordinary swaying or jerking or jolting of this train. Of course, if you find that there was no extraordinary jolting or swaying or jerking of this train, then you should find that the operation of this train, as far as the movement of this train, was prudent, and there was no negligence in this particular aspect.

"That does not mean, that if you find an absence of swaying or jerking, that you still can not find that there was debris or slush and an absence of light that caused the injury."

floor and lighting conditions. Concerning these items there was adequate evidence. It must be presumed that the jury's verdict was based on negligence thus properly found and not, contrary to the charge, upon extraordinary swaying of which there was no evidence.

Defendant also attacks the conduct of the trial and the admission of testimony, but points to nothing which would warrant reversal. Accordingly, the judgment is

Affirmed.

APPENDIX B

(Opinion By Court Of Appeals Dated July 17, 1961 Granting Rehearing And Reversing Judgment And Remanding)

PER CURIAM:

Our original opinion filed May 23, 1961 was based on a belief that the trial judge had effectively removed from consideration by the jury any claim of injury due to extraordinary swaying of the train by the excerpt from the charge therein quoted. But this position, we must in candor admit, is untenable in view of the later instructions which the appellant now stresses. Thus the jury was instructed that if it found the passageway of the car unsafe because of slush or lack of light "or if you find that the train was moving along in such a negligent and careless manner that there was an *extraordinary jerking or jolting or swaying*, and again, I say only if there is such evidence of this, and *I leave it to the jury's best recollection to determine that* * * *." That the emphasis just indicated is ours—and not necessarily that of the judge below—cannot disguise the fact that the jury was given to understand that it lay within their power to find extraordinary swaying. Especially is this so in view of an instruction given in the course of

the exceptions to the charge that "if you find that there was an extraordinary swerving * * * then obviously no knowledge of such an act [on the part of the railroad] must be shown * * *." And the appellant is right in its assertion that there was no evidence whatsoever of extraordinary swaying.

It follows that an issue was submitted to the jury on which there was no evidence. This was reversible error, as is attested by myriad cases, *e.g.*, *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 78-79; *Erie Railroad* v. *Gallagher*, 2 Cir., 225 F. 2d 814; *Schilling* v. *Delaware & Hudson R. Corp.*, 2 Cir., 114 F. 2d 69; *Thompson* v. *Peterson*, 152 App. Div. 667, 137 N. Y. Supp. 635.

Since now persuaded that there must be a new trial a word or two is in order on other claims of error originally pressed which otherwise may reoccur. We agree that it was improper to allow the plaintiff-husband to testify to complaints made by his wife, *Raymond & Whitcomb Co.* v. *Ebsary*, 2 Cir., 9 F. 2d 889, and to question witnesses (railroad employees) as to complaints as to the condition of the car made by a third person (Barron) who never testified. *Cf. Syracuse Broadcasting Corp.* v. *Newhouse*, 2 Cir., 236 F. 2d 522. The questions cannot be justified as proper cross-examination: the witnesses denied having received complaints from Barron and his statement, which was marked Exhibit Q for identification, failed to show that he did indeed complain to the witnesses. Merely because we thought these errors in the context of the first trial were harmless, it does not follow that they should be repeated in a second trial.

Reversed and remanded.

NOV 13 1961

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 494

FREIDA MANDEL and SAM MANDEL,

Petitioners,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES S. ROWEN,
Attorney for Respondent,
Office & P. O. Address,
39 Broadway,
New York 6, New York.

INDEX TO BRIEF

	PAGE
Opinion Below	1
Question Presented	2
Statement of Facts	2
Argument	5
Conclusion	8

CASES CITED

Rice v. Sioux City Memorial Park Cemetery, 349 U. S. 70 (1955) 8

Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500 (1957) 7

Staller v. Phila. Rapid Transit Co., 339 Pa. 100, 14 A. 2d 289 (Sup. Ct., Pa., 1940) 6

Taylor v. Westchester St. Transit Co., Inc., 276 App. Div. 874, 93 N.Y.S. 2d 395 (2d Dept. 1949) 6

Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 78-79 (1907) 7

In The

Supreme Court of the United States

OCTOBER TERM, 1961

No. 494

Freida Mandel and Sam Mandel,

Petitioners,

against

The Pennsylvania Railroad Company,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, reversing the judgment of the United States District Court for the Eastern District of New York and remanding the action thereto for a new trial, is reported in 291 F. 2d 433. No opinion was rendered by the United States District Court.

Question Presented

Whether or not certiorari should be granted to review a judgment of the Court of Appeals for the Second Circuit which reversed a judgment of the District Court in favor of the petitioners and remanded the action for a new trial on the ground that the District Court erroneously charged the jury that it may find extraordinary jerking or jolting or swaying of respondent's train of which there was no evidence whatsoever.

Statement of Facts

This common-law negligence action which was commenced in the Supreme Court of the State of New York, County of Kings, was removed to the United States District Court for the Eastern District of New York by reason of diversity of citizenship.

The petitioners, who travelled from New York, N. Y. to Hot Springs, Arkansas during December 5-7, 1957, claimed that on December 6, 1957, the petitioner, Freida Mandel, was caused to fall in the aisle of a railroad car operated by the respondent while it was moving in the vicinity of Port Royal, Pennsylvania.

The evidence of an alleged dangerous condition and notice thereof was sharply conflicting. The evidence pertaining to the manner of the movement of the train was not disputed and is as follows:

Samuel Mandel—Cross:

> (300) "Q. Was the train swaying as you walked back toward the back of the car? A. What?
>
> Q. Swaying? A. Yes." (Appellant's Appendix p. 15a)

Paul E. Westbrook—Direct:

> (337) "Q. Did you ask her how she fell? A. Yes.

Q. What did she say? A. Yes, and she said that the train gave a jerk and caused her to fall." (Appellant's Appendix p. 17a)

(351) "Q. Now, sir, will you describe the movement off the train for us as it was going from Altoona—excuse me, from Harrisburgh to Altoona?"

* * * *

"A. Well, the train makes the usual motion—

Mr. Birnbaum: I object to 'the usual motion', if your Honor please.

The Court: Strike it out.

A. (Continuing) The train makes a motion like anything else on wheels. There is a slight sway one way orr the other. That's about all.

(352) Q. All my questions are directed to this night, caan you describe for us the movement of the train amd swaying of the train as it goes around a curve, thaat is, on December 5, 1957?"

* * * *

"A. In going around the curve, the train will swerve straight in the direction of the curve, and will straighten up after it leaves the curve. it will straighten up again.

The Court: On this particular night, that was tthe sway?

The Witness: Yes.

The Court: No sudden stops or swaying?

The Witness: That is right.

The Court: And you remember that on this night?

The Witness: Yes." (Appellant's Appendix pp. 220a, 21a and 22a).

William W. Dalbey—Direct:

((526) "Q. Could you tell us what the movement of thee train was on the night of December 6, December 7, 11957? A. You mean as to the roughness?

Q. Describe the movement for us? A. I didn't see anything unusual of the train. It wasn't rough, that I noticed.

(527) Q. Could you tell us something about the movement as it corresponds to the way the tracks are laid? A. On a straightaway, it is smooth, the ground curves and the train goes like that (indicating)." (Appellant's Appendix p. 28a)

The Trial Court charged:

(723) "However, if you find that the aisle or passageway to the lavatory was in a dangerous or in an unsafe condition, by reason of the presence of slush or some material, or because it was dark, or because of a combination of both, or if you find that the train was moving along in such a negligent and careless manner, that there was an extraordi- (724) nary jerking or jolting or swaying, and again, I say only if there is such evidence of this, and I leave it to the jury's best recollection to determine that, or if you find that there was a combination that created this passageway as an unsafe or dangerous passageway, and if you found further that the course of the unsafe and dangerous condition, the plaintiff fell, then you must direct your attention to the question of damages." (Appellant's Appendix p. 39a.)

"The same as the swerving or unusual or exaggerated jolting or extraordinary swerving of the railroad. I am not saying that there is such testimony. The Court has pointed out that it has no recollection of it, but if you find that there (734) was an extraordinary swerving, jolting, jerking, then obviously no knowledge of such an act must be shown because the employees of the railroad, themselves performed it." (Appellant's Appendix p. 45a)

The jury rendered a general verdict for the plaintiffs and the defendant appealed from the judgment thereon

on the ground that an issue of which there was no evidence was submitted to the jury. Initially, the Court of Appeals affirmed. The defendant petitioned for rehearing and the plaintiffs pursuant to the direction of the Court of Appeals submitted a Memorandum in Opposition to said petition. On the Petition for Rehearing, the judgment for the plaintiffs was reversed and the action remanded for a new trial.

The Court of Appeals, noting its mistaken belief that a claim for injury due to extraordinary swaying of the train had not been submitted to the jury, stated:

> "[1] It follows that an issue was submitted to the jury on which there was no evidence. This was reversible error, as is attested by myriad cases, e.g., Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 78-79, 27 S. Ct. 412, 51 L. Ed. 708; Erie Railroad Co. v. Gallagher, 2 Cir., 255 F. 814; Schilling v. Delaware & Hudson R. Corp., 2 Cir., 114 F. 2d 69; Thompson v. Peterson, 152 App. Div. 667, 137 N.Y.S. 635." (291 F. 2d 433, 435)

A subsequent Petition for Rehearing by the plaintiffs was denied.

ARGUMENT

The petitioners have not cited any special or important reasons for this Court to exercise its judicial discretion to grant a writ of certiorari.

Although the Court of Appeals in its initial and subsequent opinions stated that there was no evidence whatsoever of extraordinary swaying, the trial judge had no recollection of unusual or exaggerated jolting or extraordinary swaying (Appellant's Appendix pp. 38a, 39a, 45a), there was no evidence thereof according to numerous decisions which the plaintiffs never claimed were inapplicable, and although the petitioners never seriously contended

until the reversal of the judgment that the alleged increased speed was evidence of extraordinary movement (Appellees' Brief, Memorandum in Opposition to Defendant's Petition for Rehearing, Plaintiffs' Petition for Rehearing), the petitioners now seek to avoid a new trial at which the jury may be properly instructed by alleging that the Court of Appeals substituted its view of the facts for that of the jury.

There is no evidence in this action nor do the petitioners claim that there is evidence "that the movement of the car was so unusual and extraordinary as to be beyond a passenger's reasonable anticipation", "that the allegedly unusual movement had an extraordinary disturbing effect upon other passengers", or "of an accident, the manner of the occurrence of which or the effect of which upon the injured person inherently establishes the unusual character of the jolt or jerk" to show extraordinary swaying for which the railroad would be liable. *Taylor* v. *Westchester St. Transit Co., Inc.*, 276 App. Div. 874, 93 N.Y.S. 2d 395 (2d Dept. 1949); *Staller* v. *Phila. Rapid Transit Co.*, 339 Pa. 100, 14 A. 2d 289 (Sup Ct., Pa., 1940). See cases cited at pages 9-13 of Appellant's Brief.

Instead, the plaintiff, Samuel Mandel, testified that the train was only "swaying". The conductor and trainman stated that it made "a motion like anything else on wheels", "a slight swaying one way or the other" and "no sudden stops or swaying". Assuming that the two hour twenty-five minute train trip required two hours fourteen minutes and not the two hours twenty-four minutes, also stated by the conductor (Record, p. 354), there is no testimony that the train did not make shorter intermediate delays or that the increased speed, if any, occurred at Port Royal, Pennsylvania, where the track is perfectly straight (Appellant's Appendix p. 18a). Further, common experience establishes that a train's high rate of speed dictated by the public's desire for rapid transportation does not cause an extraordinarily disturb-

ing effect on passengers or movement beyond a passenger's reasonable anticipation. To hold in this action that the jury may find the railroad liable for the alleged extraordinary swaying of its moving train would be contrary to law and would subject railroads to responsibility for the movement incidental to its form of transportation over which it has no control.

The decision of the Court of Appeals that the Trial Court's charge in this action that the jury may find the railroad negligent because of extraordinary jerking or swaying of the train was reversible error has ample legal support. *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 78-79 (1907). See the cases cited at 291 F. 2d 433, 435 and at page 3 of defendant's Petition for Rehearing. As was argued to the Court of Appeals, to hold otherwise would permit a Trial Court to submit to a jury a theory of liability which is inapplicable to the evidence in the action before it and would impose liability without fault.

The Court of Appeals held that questions of complaints of the condition of the railroad car made by one who never testified are hearsay evidence and, therefore, improper cross examination (291 F. 2d 433, 435). Since such complaints are assertive evidence of the alleged condition the existence of which was denied, it is apparent that the citations set forth in the petition herein at pages 7, 8 are not pertinent and that the petitioners' contention is without merit.

In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500 (1957), this Court stated that writs of certiorari in Federal Employers' Liability Act cases were issued for the following reason:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases." (pp. 509, 510)

The case at bar is the ordinary common-law negligence action which as stated by Mr. Justice Brennan lacks the special features granted by federal statute and is significantly different from an action commenced pursuant thereto. It is respectfully submitted, therefore, that the cases relied on by the petitioners (Petition, pp. 5, 6) are inapplicable to this ordinary common-law negligence action.

It is manifest that this petition for a writ of certiorari does not involve either principles the settlement of which is of importance to the public or conflict of opinion and authority between the Courts of Appeal. The issues herein arise out of a common-law negligence action, are of interest only to the particular litigants herein, and will be resolved according to proper instructions at the new trial directed by the Court of Appeals.

Therefore, it is respecfully submitted that the petition be denied. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1955).

CONCLUSION

It is respectfully submitted that there being no basis for the writ, the petition should be denied.

Respectfully submitted,

JAMES S. ROWEN,
Attorney for Respondent.